2007

State of Utah v. Kenneth Ray Underwood : Brief of Appellee

Utah Court of Appeals

Randall W. Richards; Public Defender Ass'n of Weber County; Counsel for Appellant.
Jeffrey S. Gray; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; William Daines; Weber County Attorney's Office; Counsel for Appellee.

Case No. 20070216-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Kenneth Ray Underwood,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for burglary and theft, both second degree felonies, in the Second Judicial District Court of Utah, Weber County, the Honorable Parley R. Baldwin presiding.

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

WILLIAM DAINES
Weber County Attorney's Office

Counsel for Appellee

RANDALL W. RICHARDS
Public Defender Ass'n of Weber County
2550 Washington Blvd., Ste. 300
Ogden, UT 84401

Counsel for Appellant

Oral Argument Requested

Case No. 20070216-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Kenneth Ray Underwood,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for burglary and theft, both second degree felonies, in the Second Judicial District Court of Utah, Weber County, the Honorable Parley R. Baldwin presiding.

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

WILLIAM DAINES
Weber County Attorney's Office

Counsel for Appellee

RANDALL W. RICHARDS
Public Defender Ass'n of Weber County
2550 Washington Blvd., Ste. 300
Ogden, UT 84401

Counsel for Appellant

Oral Argument Requested

TABLE OF CONTENTS

NO ADDENDA NECESSARY

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

FEDERAL RULES

STATE RULES

Case No. 20070216-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Kenneth Ray Underwood,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (West 2004), and theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (West 2004). This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUES[1]

1. Did the admission of hearsay testimony violate Defendant's Sixth Amendment right to confront the witnesses against him?

Standard of Review. The Court's "standard of review on the admissibility of hearsay evidence is complex, since the determination of admissibility 'often contains

[1] To facilitate its argument, the State addresses Defendant's second issue in point III, his third issue in point IV, and his fourth issue in point II.

a number of rulings, each of which may require a different standard of review.'" *State v. Workman*, 2005 UT 66, ¶ 10, 122 P.3d 639 (quoting Norman H. Jackson, *Utah Standards of Appellate Review*, 12 Utah Bar J. 8, 38 (1999)). The Court "review[s] the questions of fact for clear error" and "the district court's ruling on admissibility for abuse of discretion." *Id.* (internal citations omitted). The Court "review[s] the legal questions to make the determination of admissibility for correctness." *Id.* Whether a defendant was denied the constitutional right to confront the witnesses against him "presents a question of law which is reviewed for correctness." *State v. Gonzales*, 2005 UT 72, ¶ 47, 125 P.3d 878. However, where a claim is raised for the first time on appeal, as here, this Court will not review that claim absent a showing of plain error. *See State v. Vargas*, 2001 UT 5, ¶¶ 38-39, 20 P.3d 271.

2. Did the prosecutor lay a proper foundation for the admission into evidence of the coins and medallions obtained from the office of Aric Cramer?

Standard of Review. "A trial court's determination that there was a proper foundation for the admission of evidence 'will not be overturned unless there is a showing of an abuse of discretion.'" *State v. Torres*, 2003 UT App 114, ¶ 7, 69 P.3d 314 (quoting *State v. Wynia*, 754 P.2d 667, 671 (Utah App. 1988)).

3. Was the evidence sufficient to support Defendant's conviction for burglary and theft?

Standard of Review. When reviewing the results of a bench trial for sufficiency of evidence, the Court reviews the trial court's findings for clear error. *State v. Briggs*, 2008 UT 52, ¶ 10. Accordingly, the Court will "'sustain the trial court's judgment unless it is against the clear weight of the evidence, or if [the Court] otherwises reaches a definite and firm conviction that a mistake has been made.'" *Id.* (quoting *State v. Gordon*, 2004 UT 2, ¶ 5, 84 P.3d 1167). And where, as here, the defendant did not preserve a challenge to the sufficiency of the evidence by proper motion or objection, he must demonstrate that the insufficiency was obvious. *State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346. *But see State v. Larsen*, 2000 UT App 106, ¶ 9 n.4, 999 P.2d 1252 (holding that under rule 52(b) of the Utah Rules of Civil Procedure, a defendant may challenge the sufficiency of the evidence for the first time on appeal when the verdict arises from a bench trial).

4. Was trial counsel constitutionally ineffective for failing to move for a directed verdict after the parties had rested?

Standard of Review. "Ineffective assistance of counsel arguments raised for the first time on appeal are reviewed for correctness as a matter of law." *State v. Vos*, 2007 UT App 215, ¶ 9, 164 P.3d 1258, *cert. denied*, 186 P.3d 347.

5. Where the State inadvertently failed to move for the admission of certain exhibits during its case in chief, did the trial court properly permit the State to reopen its case after Defendant rested to permit admission of those exhibits?

Standard of Review. A trial court's decision to reopen a case to permit a party to introduce additional evidence is reviewed for an abuse of discretion. *See State v. Gregorious*, 81 Utah 33, 16 P.2d 893, 895 (1932).

6. Did the cumulative effect of the alleged errors deprive Defendant of a fair trial?

Standard of Review. This Court will not reverse a conviction under the cumulative error doctrine unless "the cumulative effect of the several errors undermines [the Court's] confidence . . . that a fair trial was had." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Rule 901(a), Utah Rules of Evidence

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

STATEMENT OF THE CASE

Defendant was charged with burglary and theft, both second degree felonies. R. 1-2. Initially, he was represented by the public defender, but he thereafter retained Stephanie Miya, a St. George attorney, to represent him. R. 4, 22. Following a preliminary hearing, Defendant was bound over to stand trial on both charges. R. 25-26, 30-32. Citing, among other things, the possibility that Ms. Miya may be called as a witness by the State to testify about her receipt of coins allegedly taken in the burglary, the State filed a motion to disqualify Ms. Miya as Defendant's attorney. R. 308: 45-51. She opposed the motion, but moved to withdraw because Defendant had not paid for her services and had expressed his wish to represent himself. R. 58-66, 67-70. The trial court declined to rule on the State's motion to disqualify, but granted Ms. Miya's motion to withdraw. R. 55-56. Defendant subsequently waived his right to an attorney, electing to proceed pro se, and the court appointed a public defender to act as standby counsel. R. 103, 105.

After Ms. Miya was subpoenaed by the State to testify at trial, her attorney, Aric Cramer, filed a motion to quash the subpoena. R. 106-09. That motion was denied at trial. R. 126; R. 308: 54-65. Following a two day bench trial, Defendant was found guilty of both counts as charged. R. 126-27, 132-33, 308-09. He was sentenced to concurrent prison terms of one-to-fifteen years on both counts. R. 139-40. Nearly ten months after sentencing, Defendant moved to set aside or vacate his

sentence on the ground that he had uncovered mitigating evidence in the form of mental health records. R. 161-70. The trial court denied the motion for lack of jurisdiction. R. 187-88. A motion to reconsider that decision was also denied. R. 203-08, 222-26.

On October 11, 2006—almost one year after being sentenced—Defendant filed a pro se notice of appeal. R. 181-82. After being appointed to represent defendant on appeal, the public defender filed a second notice of appeal. R. 198-99, 212. This Court dismissed the appeal for lack of jurisdiction. R. 241-43. Defendant filed with the trial court a motion to reinstate the appeal. R. 237-40, 249-52. The trial court granted Defendant's motion and reinstated the appeal. R. 255-56. Defendant, through appointed counsel, thereafter filed a third notice of appeal. R. 259-60. Defendant also filed a fourth notice of appeal pro se. R. 270. Defendant, through his attorney, filed a motion with this Court asking that the case be remanded under rule 23B, Utah Rules of Criminal Procedure, to determine whether he received ineffective assistance of counsel. R. 272-73. The Court denied Defendant's motion, but remanded the case to the district court "to determine whether conflict appellate counsel [should] be appointed." R. 282-83. On remand, the district court found no conflict and remanded the case back to this Court. R. 301, 305-06.

STATEMENT OF FACTS

In January 1999, Defendant married Susan Weight. R. 308: 19. The couple gave birth to a son in 2003. R. 308: 22. But in February 2004, Susan left Defendant and filed for divorce. *See* R. 308: 21-2. She and her son moved in with her parents, Sheryl and Antoinette Weight, in North Ogden. *See* R. 308: 21-23, 89. Also living at the home was Susan's sister, Serena, and Susan's two older children by a different father—both in the custody of Susan's parents. R. 308: 27-28, 89. In May 2004, Susan and Defendant had a brief affair and she became pregnant. R. 308: 21-22. But in June, she told Defendant that he was no longer welcome at her parent's home. *See* R. 308: 22, 94. In late July and early August, the Weights saw Defendant on several occasions watching the house from a hill in the cemetary across the street. R. 308: 24, 26, 74, 91-92, 174.

On August 1, Mr. Weight was notified that the car he had purchased and allowed Defendant to drive had been impounded by North Ogden police after Defendant's arrest for DUI. *See* R. 308: 25, 90. Mr. Weight went to the impound lot, paid the applicable fees, and recovered the car. R. 308: 90-91. However, he did not return the car to Defendant because Defendant had failed to stay current on the car payments, as he had agreed. R. 308: 24-25, 90-91.

Burglary at the Weight Home

On Sunday, the 15th of August, everyone in the Weight household but Susan and her napping son left the home just before 11:00 a.m. to attend church. R. 308: 26-28, 93, 160, 162, 178. At 12:20 p.m., Susan and her son also left for church, leaving the house empty. R. 308: 28-29. Five minutes later, the instant messaging on Serena's laptop computer, which she had left running in her bedroom, went off line. R. 308: 170.

When the Weights returned home from church just before 2:00 p.m., Serena's Ford Escort was missing from the driveway. R. 308: 29-30, 94, 164-67. When Serena went into the home, she took "special note" that her car keys had also been taken. R. 308: 166-67. The Weights also discovered that almost their entire coin and medallion collection was missing from their curio in the bedroom. R. 308: 95-96. That collection included LDS temple medallions by Rust Coin, commemorative coins for the LDS Conference Center and Nauvoo temple, six commemorative Harry Potter coins, various coins and coin sets from the birth years of family members and significant others, a gold and silver coin set commemorating the 2002 Olympics, and an 1898 gold coin mounted in a gold metal ring with a chain. R. 308: 95-96.

Also missing from the home was Serena's laptop computer and a laptop computer used by Mrs. Weight. R. 308: 99-100, 167-70, 178-79. In addition, the thief took Susan's purse, containing her cell phone, her wallet, her mother's rings, and a

customized Zippo screwdriver set Susan had received as a Christmas gift from her employer, TrueValue. R. 308: 30-31. The pocket knife was probably one of only seven or eight in Ogden: it was specially ordered for the TrueValue employees in Ogden and was inscribed with the TrueValue name. R. 308: 79.

The thief also took a VISA credit card that was in Serena's purse. *See* R. 308: 163-64, 171-73. Serena telephoned her credit card company to cancel the card, but before she did so, the thief made two unauthorized charges on the card. R. 308: 171-73. At 1:35 p.m., he used the card to purchase gas at a Smith's Food King in Salt Lake City. R. 309: 207. At 2:32, he used the card a second time to make a gas purchase at a Walker's convenience store in Payson. R. 309: 207.

Defendant's Pawning Spree

In the days following the burglary, Defendant pawned coins and medallions at pawn shops in St. George, Mesquite, Nevada, and Salt Lake City.

Pawn Plus (St. George). On August 16, the day after the burglary, Defendant appeared at Pawn Plus in St. George, pawning a 2002 Olympic gold medallion. R. 308: 48; P5; R. 309: 203-04, 209, 271-72, 324-25.

Cedar Post Pawn Shop (St. George). Two days later, on August 18, Defendant sold a rare 1898 gold coin to the Cedar Post Pawn Shop in St. George for two hundred dollars. R. 309: 189-91, 199, 242, 329. The coin matched the description of the 1898 coin identified by Mr. Weight as stolen from his home, but it was no longer

mounted to a gold metal ring with a chain. R. 308: 96; R. 309: 195. When Defendant appeared at the pawn shop, he was carrying a large duffle bag of coins and appeared "quite tired." R. 309: 189-90, 192, 197-98. Defendant told the clerk that his car had broken down on the freeway, that he had hitchhiked into town, and that he "had been walking a ways." R. 309: 190, 196. After the clerk purchased the gold coin, he drove Defendant to a local motel, where Defendant said he was staying. R. 309: 193.

Virgin Valley Pawn Shop (Mesquite, NV). One day later, on August 19, Defendant pawned eighty-eight silver coins and one silver piece at the Virgin Valley Pawn Shop in Mesquite, Nevada. R. 308: 44-45, 65-66, 69-71; P3-4; R. 309: 208-09, 253, 294-96, 304, 315-16.[2] Seventy-eight of the 88 coins were LDS temple medallions. *See* R. 309: 316-18.

Crown Jewelers & Pawn (Salt Lake City). By the following day, Defendant was back in northern Utah. On August 20, he pawned numerous coins at Crown Jewelers & Pawn in Salt Lake City, including eight silver proof sets from years 1972, 1974, 1993 (two sets), 1994 (two sets), 1999, and 2003; a silver quarter series set; four silver quarter Milleniums; and six Harry Potter medallions. R. 309: 263-67, 278-82, 289, 308-09, 312; P33; P7. He returned to the pawn shop three days later and

[2] Although he did not testify, Defendant admitted to the judge during trial that he pawned 88 silver coins at Virgin Valley Pawn. R. 309: 296-97.

pawned an additional four coins: a Liberty dollar, a walking Liberty half dollar, and two Morgan dollars. R. 309: 279, 282, 289, 310-11; P32; P8.

Defendant's Incriminating Comments to His Brother-In-Law

By August 25, Defendant was back in Ogden. R. 308: 146-49; R. 309: 292. He came into the Sacred Art Tatoo Parlor where his brother-in-law, Charles Hall, worked. R. 308: 146-49. Hall had heard that the Weights' home had been burglarized, but did not know what had been taken. R. 308: 148-49. Defendant told Hall that Serena Weight's car was fast and had "low mileage." R. 308: 150. He also said that if the car was missing, "it could be in the desert somewhere." R. 308: 150. Finally, he mentioned to Hall that he knew "where a couple [of laptops] were, and wanted to know if [he] was interested in one." R. 308: 151.

Defendant's Incarceration

On September 9, 2004, Defendant was incarcerated on unrelated charges in the Salt Lake jail. R. 309: 224, 237.

Discovery of Serena Weight's Car in Scenic, Arizona

On September 26, a construction worker noticed Serena Weight's Ford Escort parked on a roadway in Scenic, Arizona—it had not been there the previous day. R. 308: 102; R. 309: 213-15, 237-38, 240-41, 251; P15. When the car remained unmoved at that location for two days, the construction worker reported it to the Mohave County Sheriff's Office. R. 309: 238-39, 242. An examination of the car revealed that

someone had tampered with the steering column and hotwired it. *See* R. 309: 219-20. The car was not processed for fingerprints because it was very dusty, the windows had been left down, and someone had sprayed Shout laundry cleaner all over the interior of the vehicle. R. 309: 243. The Weights' insurance company later had the car towed to its auto auction lot in Ogden. R. 309: 217-19.

Defendant's Attorney Redeems the Pawned Coins

In early November, Defendant signed two notarized letters authorizing the release of the property he pawned at Virgin Valley Pawn Shop and Crown Jewelers & Pawn, to his attorney, Stephanie Miya. R. 308: 45-48, 65-69; R. 309: 327; P4, 6. Ms. Miya thereafter went to the two pawn shops, paid the bonds on the pawned items, and took possession of them. R. 308: 65-71; R. 309: 211, R. 309: 256, 282-89, 304; 308, 312 P7-8.

Defendant's Incriminating Disclosures

Later in November, Defendant telephoned Susan from jail. R. 308: 75. He called her several times over the ensuing weeks, admitting that he knew the location of the stolen goods. *See* R. 308: 41. He told Susan that his attorney received the stolen medallions or coins "in lieu of payment" for her legal services, but that he would be able to "purchase them back from her." R. 308: 41.

On December 1, Detective Quinney transported Defendant from the Salt Lake City jail to the Weber County Jail so he could appear on a warrant issued by a justice

court in Ogden. R. 309: 224. Shortly thereafter, Defendant again telephoned Susan, asking her to retrieve from among belongings at the jail notarized letters authorizing her to withdraw money from a St. George bank account for the children's Christmas. R. 308: 33-34, 40-41, 75. When Susan went to the jail and looked through Defendant's property for the notarized letters, she found a number of items that had been in her stolen purse: the customized Zippo screwdriver set inscribed with the TrueValue name, her mother's rings, her driver's license picture, and the picture of her son Wyatt. R. 308: 35-36. She also found a written list, in Defendant's handwriting, of telephone numbers she frequently used on her cell phone. R. 308: 35, 38-39.

Some time after the burglary, Defendant sent Susan letters indicating that he would do what is necessary to have the stolen property returned. R. 308: 50-53, 76-77. He also sent a letter of apology to Mrs. Weight:

> Dear Mrs. Weight, Hello. This isn't a letter to try and get you anything to do. I apologize for all of this. I severely apologize and ask all of your forgiveness. I'm scared and I'm at the bottom of the pit. I have only dug for myself. I don't know if I'm just digging a hole deeper, either. I screwed up, and had I not been on drugs, I would have never went where I went, or done what I done. I've done everything I can to keep a hold of everyone's concern, some 80 percent I retained. The rest, your mother's, is in Pinto, Utah. I can only speak so much here. I want nothing more than for you to know what you all need to know. Everything is safe for the time being. I did what I did, because – and this isn't an excuse, cause I thought my car was taken from me. Please forgive me, all of you. I need my family back. I need my life back. I need my kid. I need your forgiveness. I made a lot of bad choices.

R. 308: 181-82; P14. (When Mrs. Weight began reading the letter at trial, Defendant interjected: "Excuse me. Excuse me, Your Honor. I'd like to enter into a guilty plea at this time." R. 308: 181. After an off-the-record discussion with the judge, the trial proceeded.)

Detective Quinney's Investigation

Detective Dirk Quinney of the North Ogden Police Department investigated the case and learned that Defendant had pawned the coins and medallions at the various pawns shops in St. George, Mesquite, and Salt Lake City. R. 309: 202-04, 2008-09, 328-29. Pawn Plus could not immediately find the 2002 Olympic gold coin Defendant had pawned at the shop, but found it a few weeks after Deputy Quinney visited the shop and thereafter surrendered it to Ogden police. R. 309: 203-04, 209, 324-25. Cedar Post Pawn Shop no longer had the 1898 gold coin purchased from Defendant, having sold it to another customer. R. 309: 194, 271. When Deputy Quinney visited Virgin Valley Pawn in Mesquite and Crown Jewelers in Salt Lake City, he discovered that Stephanie Miya had already paid the bond on the coins and recovered possession of them. *See* R. 309: 210-11, 277. Later, pursuant to a court order, Ms. Miya delivered the 204 coins she redeemed from Virgin Valley Pawn and Crown Jewelers to her attorney, Aric Cramer. R. 308: 66-68, 103; R. 309: 293-94, 314-16, 328.

On September 8, Detective Quinney went with Mr. Weight to Mr. Cramer's office for the purpose of identifying the coins. R. 308: 103; R. 309: 254, 328. Mr. Weight identified 78 of the 80 temple medallions stolen from his curio—two were still missing. R. 308: 103-05, 123; R. 309: 316-18. Three of his coins had not been taken during the burglary. R. 308: 105. Weight also identified as his a set of 1947 coins corresponding to his birth year, a 1936 half dollar corresponding to the birth year of his wife, and numerous other coins or coin sets corresponding to the birth years of children, grandchildren, babysitters, and others. After Mr. Weight identified the coins as those stolen from his curio, Detective Quinney took possession of them. R. 309: 270.

SUMMARY OF ARGUMENT

I. Hearsay and implied hearsay. Defendant contends that the trial court erred in permitting Deputy Quinney to give hearsay testimony regarding the location of the stolen car in Arizona. However, he did not object to the testimony and thus waived any challenge to its admission on appeal. Moreover, he invited any error when he stated that all were agreed that the car was found in Arizona.

Defendant also contends that admission of the coins recovered from Aric Cramer's office was based on the implied hearsay of Mr. Cramer that the coins he provided Mr. Weight were the same coins Stephanie Miya provided him. However, Defendant has not analyzed his "implied hearsay" theory or otherwise cited to any

legal authority in support thereof. This court should not therefore address it. In any event, Defendant did not object to such "implied hearsay" at trial and he has thus waived any challenge to it on appeal.

II. Chain of custody. Defendant contends that Mr. Cramer's failure to testify about his receipt and delivery of the coins was a necessary link to establish the foundation for the coins admission. The coins, however, were fairly unique, readily identifiable, and relatively impervious to change. Thus, Mr. Weight's identification of them as the coins stolen from his home was sufficient to establish foundation.

III. Sufficiency of the evidence. Defendant challenges the sufficiency of the evidence. However, he has failed to marshal the evidence in support of the verdict. Accordingly, this Court should presume that the evidence was sufficient to support Defendant's convictions.

IV. Ineffective assistance of counsel. Defendant waived his right to counsel and represented himself *pro se*. Accordingly, he cannot claim ineffective assistance of counsel.

V. Reopening of case to admit exhibits. The court acted well within its discretion when, as a housekeeping matter, it reopened the case to admit exhibits discussed during trial but not ruled on.

VI. Cumulative error. Because there was no error, there was no cumulative error.

ARGUMENT

I.

DEFENDANT WAIVED ANY CHALLENGE TO THE ADMISSION OF HEARSAY EVIDENCE WHEN HE FAILED TO OBJECT TO IT AT TRIAL

Defendant contends that numerous hearsay statements were admitted into evidence in violation of his Sixth Amendment right to confront the witnesses against him. Aplt. Brf. at 21-26, 37-40. Specifically, he objects to (a) Deputy Quinney's testimony regarding the location where the stolen car was discovered, and (b) the State's failure to call as a witness Defendant's attorney, Aric Cramer, regarding coins he provided to Detective Quinney and Mr. Weight at his office. Aplt. Brf. at 21-26, 37-40. Defendant's challenges to this testimony lack merit.

A. Defendant waived any challenge on appeal to hearsay evidence regarding the location of the stolen car.

At trial, Deputy Quinney testified that Serena Weight's car was found in Scenic, Arizona by Deputy Cardinal of the Mohave County Sheriff's Office. R. 309: 214. He also testified that an employee of Tri-State Towing told him the car was towed from Scenic, Arizona to an auction lot in Ogden. R. 309: 217-18. Defendant argues that the admission of this hearsay evidence violated his Sixth Amendment right of confrontation, denying him "the opportunity to cross-examine these important witnesses against him." Aplt. Brf. at 23-24. Defendant, however, did not

object to the admission of this hearsay evidence and he thus waived any challenge to it on appeal.

The law is well settled that absent plain error or exceptional circumstances, "claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. This rule of preservation "applies to every claim, including constitutional questions." *Id.* Moreover, the preservation rule is "not relaxed simply because the defendant appears *pro se*." *State v. Brodowski*, 600 A.2d 925, 926 (N.H. 1991). A *pro se* defendant is expected to comply with, and bound by, the rules of evidence and criminal procedure. *See Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983) ("As a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar."); *State v. Pedockie*, 2006 UT 28, ¶ 38, 137 P.3d 716 (observing that a defendant appearing *pro se* is expected to "comply with technical rules").

Defendant acknowledges that he did not object to Deputy Quinney's testimony regarding his conversation with the Tri-State employee. Aplt. Brf. at 22. However, he claims that he "objected to th[e] testimony" relating his conversation with Deputy Cardinal. Aplt. Brf. at 21-22. The record does not support this assertion.[3]

---

[3] Defendant has not challenged on appeal the admission of the photographs. *See* Aplt. Brf. at 21-26.

During direct examination, Detective Quinney testified that Deputy Cardinal of the Mohave County Sheriff's Office showed him where the car was found. R. 309: 214. Defendant did not object to this testimony, and the prosecutor continued with his examination of Detective Quinney. *See* R. 309: 214. He showed Defendant four photographs of the area where Deputy Cardinal said the car was found. R. 309: 214-15. After laying a foundation, the prosecutor asked the trial court to admit the photographs. R. 309: 215. Before doing so, the court asked Defendant if he had any objections to their admission. R. 309: 215. Defendant questioned only their relevance and, significantly, asserted that the car's location was not at issue:

> What evidence do they serve, other than the location of the car. ***I think we're all agreed that the car was found in Arizona.*** What does the picture have to prove?

R. 309: 215 (emphasis added).

Defendant's failure to object to Detective Quinney's testimony resulted in a waiver of any challenge to that testimony on appeal. *See Holgate*, 2000 UT 74, at ¶ 11. Moreover, Defendant's statement that "we're all agreed that the car was found in Arizona" constituted invited error. Having affirmatively led the trial court into believing that the location of the stolen car was not at issue, Defendant is barred on appeal from claiming error, plain or otherwise. *See State v. Medina*, 738 P.2d 1021, 1023 (Utah 1987) (holding that where counsel "affirmatively led the trial court to

believe that there was nothing wrong with the instruction, the appellate court will not review it for manifest error).[4]

Defendant may well have successfully objected to the testimony from Deputy Quinney regarding the car's location. However, the record suggests that Defendant strategically chose "not to dispute the indisputable," *United States v. Martin*, 489 F.2d 674, 678 (9th Cir. 1973), but to use that evidence to advance his theory of the case, i.e., someone else stole the car. Thus, Defendant himself elcited hearsay evidence from Deputy Quinney providing further detail surrounding the car's discovery. During cross-examination, Defendant elicited from Deputy Quinney that on September 28, a construction worker reported the stolen car to police, after he had seen it parked on a Scenic roadside for two days without being moved. R. 309: 237-41. During this questioning, Defendant pointed out that he could not have driven the car to the Scenic location because he had been in jail since September 9 and the car first appeared in Scenic on September 26. R. 309: 237-38, 241. Later, in closing, Defendant reiterated this theory. *See* R. 309: 351-52.

---

[4] Defendant could not in any event prevail on a claim of plain error or exceptional circumstances because he has not argued those exceptions on appeal. *See State v. Hobbs*, 2003 UT App 27, ¶ 33, 64 P.3d 1218 (refusing to address unpreserved claim where defendant did not argue plain error or exceptional circumstances on appeal).

In sum, Defendant waived any challenge to the hearsay evidence on appeal because he did not object to it at trial. Moreover, any possible error was invited because Defendant affirmatively agreed that the location of the stolen car was not at issue and he used the hearsay evidence to advance his theory of the case.

B. The State did not introduce any hearsay statements from Defendant's attorney, Aric Cramer.

Defendant also contends that the State relied on "implied hearsay" to establish the chain of custody linking Stephanie Miya's receipt of coins from the pawn shops and Mr. Weight's recovery of those coins from Aric Cramer's office. Aplt. Brf. at 22-25. He complains that because the State did not call Aric Cramer as a witness, "it was left to the assumption of the judge" that the coins Mr. Cramer provided to Mr. Weight "were the same coins received by [Ms.] Miya." Aplt. Brf. at 22. Defendant has not, however, identified the alleged hearsay statement of Mr. Cramer, implied or expressed, upon which the prosecution relied. *See* Aplt. Brf. at 22-25. Nor has he explained the concept of "implied hearsay," how it applies generally, or how it applies in this case. *See* Aplt. Brf. at 22-25. Moreover, he has not cited to any legal authority supporting his argument of implied hearsay. In short, Defendant's argument on this issue "is conclusory and provides no meaningful analysis," as required under rule 24 of the Utah Rules of Appellate

Procedure. *State v. Lee*, 2006 UT 5, ¶ 23, 128 P.3d 1179. This Court should therefore refuse to consider Defendant's argument. *Id.* at ¶ 22.

Even assuming arguendo that Defendant's implied hearsay claim was adequately briefed on appeal, this Court should not address it for the same reason it should not address his claim challenging the hearsay evidence of the stolen car's discovery: he waived it. Defendant acknowledges that the alleged implied hearsay "w[as] not objected to" at trial. Aplt. Brf. at 22. Accordingly, he has waived any challenge to that evidence on appeal. *See Holgate*, 2000 UT 74, at ¶ 11.

C. Defendant was not deprived of a fair trial by misleading advice from the trial court.

Citing *Orem City v. Bovo*, 2003 UT App 86, 76 P.3d 1170, Defendant argues that the trial court's numerous errors "improperly implied to [him] that his valid objections were invalid." Aplt. Brf. at 34. *Bovo*, however, does not support his claim.[5]

The Court in *Bovo* held that "[i]n some instances, lack of accurate advice by the trial court may be 'fundamentally unfair' to a *pro se* party." *Bovo*, 2003 UT App 286, at ¶ 12. The Court thus held that "[a] *pro se* defendant's 'lack of technical

---

[5] Defendant treats this claim in point III of his brief addressing ineffective assistance of counsel. *See* Aplt. Brf. at 33-37. The doctrine enunciated in *Bovo*, however, does not apply to an ineffectiveness claim, but is a limited exception excusing a *pro se* defendant from compliance with procedural rules. Accordingly, the State addresses it here.

knowledge of law and procedure . . . should be accorded every consideration that may reasonably be indulged.'" *Id.* (citations omitted). But as earlier explained by the Utah Supreme Court, "[r]easonable consideration for a layman acting as his own attorney does not require the court to interrupt the course of proceedings to translate legal terms, explain legal rules, or otherwise attempt to redress the ongoing consequences of the party's decision to function in the capacity for which he is not trained." *Nelson v. Jacobsen.* 669 P.2d 1207, 1213 (Utah 1983). In short, "[j]udges cannot be expected to perform [the] function" of defense counsel. *Id.*

Pro se defendants have been excused from a failure to comply with procedural rules where they have not been sufficiently notified of the date of trial, *Jacobsen*, 669 P.2d at 1214, where the court and prosecutor led them to believe that they would not be subject to imprisonment, *Bovo*, 2003 UT App 286, at ¶ 13, and where the court failed to give them simply advice on how to perfect a demand for a jury trial, *id.* at ¶ 12. Defendant contends that allegedly incorrect rulings on the admission of evidence are sufficient to trigger the *Bovo* exception. But as discussed above, defendant did not object to the hearsay and implied hearsay. The court was not required to act as counsel by sua sponte ruling on the evidence. *See Jacobsen*, 669 P.2d at 1213. Defendant also cites to instances where objections to leading questions were overruled. Aplt. Brf. at 34-35. He has not, however, explained how the alleged leading questions harmed him. "A trial court has discretion in permitting leading

questions on direct examination 'as may be required to develop [the witness's] testimony.'" *State v. Kallin*, 877 P.2d 138, 144 (Utah 1994) (citng Utah R. Evid. 611(c)). In any event, an erroneous ruling on the admission of evidence is not alone sufficient to trigger the *Bovo* exception.

II.

THE COINS OBTAINED FROM THE OFFICE OF DEFENDANT'S ATTORNEY WERE PROPERLY ADMITTED INTO EVIDENCE

The evidence at trial established that the Weights' coin collections were stolen on August 15; that Defendant thereafter pawned some 200 coins and medallions at pawn shops from Salt Lake City to St. George to Mesquite, Nevada; that Defendant's attorney, Stephanie Miya, paid the bond on, and obtained possession of, the coins pawned by Defendant in Salt Lake City and Mesquite; that pursuant to a court order, Ms. Miya surrendered possession of those coins to her attorney, Aric Cramer; that Mr. Weight, accompanied by Deputy Quinney, identified coins at Mr. Cramer's office as those stolen from his home on August 15; and that Deputy Quinney seized those coins. *See, supra*, at 7-15.

On appeal, Defendant contends that the trial court abused its discretion in admitting the coins, arguing that the State did not establish the necessary chain of custody. Aplt. Brf. at 40-43. He contends that to introduce the coins, the State was required to call Mr. Cramer as a witness to testify that the coins he showed Mr.

Weight and Deputy Quinney were the same coins given to him by Ms. Miya. Aplt. Brf. at 41. This argument lacks merit.

Defendant's "chain of custody" argument is a challenge to foundation. Whether a proper foundation has been laid to admit real evidence is governed by rule 901 of the Utah Rules of Evidence:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Utah R. Evid. 901(a). In other words, "the proponent, prior to introducing [real] evidence, must first authenticate the evidence by showing that it is what the proponent claims it to be." *State v. Jacques*, 924 P.2d 898, 900-01 (Utah App. 1996).

"A proper foundation for the introduction of physical evidence may be laid either through witness identification or through establishment of the chain of custody." *People v. Payne*, 607 N.E.2d 375, 381 (Ill. App. 1993) (quotations and citations omitted). Whether chain of custody evidence is required depends on the nature of the evidence. Real evidence may be admitted through witness identification alone "[i]f the offered item possesses characteristics which are fairly unique and readily identifiable and if the substance of which the item is composed is relatively impervious to change." *McCormicks's Handbook of the Law of Evidence* § 212, at 527 (E.W. Cleary 2d ed. 1972); *accord Grundy v. Commonwealth*, 25 S.W.3d 76, 80 (Ky. 2000). On the other hand, "a substantially more elaborate foundation" may

be required "if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination. *McCormick*, at 527; *accord Grundy*, 25 S.W.3d at 80. Such a foundation "will commonly entail testimonially tracing the 'chain of custody' of the item with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with." *McCormick*, at 527; *accord Grundy*, 25 S.W.3d at 80.

The coins admitted in this case fall in the former category. They were fairly unique, readily identifiable, and relatively impervious to change. At trial, Mr. Weight identified as his the following coins:

- 1947 coin set corresponding to his birth year, 1947, R. 308: 106;
- Utah centennial commemorative coin, R. 308: 106;
- 1936 half dollar corresponding to his wife's birth year, R. 308: 106-07;
- LDS Conference Center coin he bought on line, R. 308: 107;
- Various coin sets corresponding to the birth years of his grandchildren, R. 308: 107;
- Harry Potter coins purchased by his wife on E-bay, R. 308: 108;
- Silver quarter proof sets, R. 308: 108;
- 1889 and 1989 silver dollars, R. 308: 108;
- Silver inget given to him by a friend to commemorate the birth of Mr. Weight's son, R. 308: 108-09;
- 1990 Eisenhower commemorative coin corresponding to the birth year of a baby sitter, R. 308: 109;
- Nauvoo temple medallions, R. 308: 109;

- Coin with black foam around it and coin with rectangular shape around it corresponding to birth years of "kids that have helped us *in the house*," R. 308: 110;
- Salt Lake Temple centennial coin, R. 308: 110;
- 1893 Morgan dollar corresponding to his father-in-law's birth year and for which he paid $150, R. 308: 110;
- Coins corresponding to his mother's birth year and his grandfather's birth year, R. 308: 110;
- Gold Olympic coin and corresponding silver Olympic coin, R. 308: 111;
- Silver eagles corresponding to the birth years of his children and grandchildren, R. 308: 111; and
- 78 LDS temple medallions, R. 308: 111.

While none of the coins were "one of a kind," they were sufficiently unique, especially in light of the fact they were found together, to support a finding that they were Mr. Weight's coins. *See United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989) (holding that the trial court "consider[s] the nature of the evidence, and the surrounding circumstances, including presentation, custody and probability of tampering or alteration"). "'Where the [coins] found and the [coins] taken correspond in a fairly close way, the fact of the finding of [those] specific [coins] would have probative value and be relevant, because the [coins] found [are] fairly marked as identical with the [coins] taken." *State v. Crowder*, 114 Utah 202, 197 P.2d 917, 207 (1948) (referring to denominations of money).

Moreover, even though Mr. Weight was not always able to say with absolute certainty that the coin was in fact his, he did testify that it was identical to his coin.

This was sufficient. "[I]t is not necessary that such identification should positively and indisputably describe such article." *Gouard v. State*, 335 P.2d 920, 922 (Okl. Cr. App. 1959). "If it is sufficiently described to justify its admission in evidence, the lack of positive identification goes to the weight of such evidence rather than its admissibility." *id.* (quotation and citation omitted).

Even assuming arguendo the State was required to establish a chain of custody, it was sufficient. As noted, the State established that Defendant pawned the coins, that Ms. Miya redeemed them and thereafter surrendered them to Mr. Cramer, and that Mr. Weight then recovered coins matching the description of the pawned coins from Mr. Cramer. This evidence established a sufficient chain of custody. The State "need not prove a perfect chain of custody for evidence to be admitted at trial; gaps in the chain normally go to the weight of the evidence rather than its admissibility." *People v. White*, 527 N.W.2d 34, 37 (Mich. App. 1994).

III.

THIS COURT SHOULD PRESUME THE SUFFICIENCY OF THE EVIDENCE BECAUSE DEFENDANT HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF HIS CONVICTIONS

Defendant argues that the evidence was insufficient to support his convictions for burglary and theft, complaining that "there are significant gaps in testimony received at trial that tie [him] to the crimes charged." Aplt. Brf. at 29. Defendant acknowledges that he did not challenge the sufficiency of the evidence by proper

motion or objection and that he must therefore demonstrate plain error to prevail on appeal. *See* Aplt. Brf. at 26-27. However, this Court need not even address Defendant's plain error claim because he has failed to meet his threshold burden to marshal the evidence.

To demonstrate that the evidence is insufficient, Defendant must first "'marshal the evidence in support of the verdict.'" *State v. Hopkins*, 1999 UT 98, ¶ 14, 989 P.2d 1065 (quoting *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991)). This requires him to "'present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings [he] resists.'" *State v. Chavez-Espinoza*, 2008 UT App 191, ¶ 20, 604 Utah Adv. Rep. 17. (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct.App.1991)). In other words, Defendant must assume the role of "devil's advocate." *Majestic Inv. Co.*, 818 P.2d at 1315. After presenting this evidence, Defendant must "'then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.'" *Hopkins*, 1999 UT 98, a ¶ 14 (quoting *Crookston*, 817 P.2d at 799). "It is not enough for Defendant to simply show that his evidence contradicts the . . . verdict or to reargue the weight of that evidence on appeal while ignoring contrary evidence." *State v. Ferreri*, 2005 UT App 465U (citing *State v. Lopez*, 2001 UT App 123, ¶ 19, 24 P.3d 993). He must instead "ferret out a fatal flaw in the evidence." *Majestic Inv. Co.*, 818 P.2d at 1315.

In this case, Defendant has failed in the first instance to marshal the evidence supporting the verdicts. Defendant acknowledges that he "is cognizant of the requirement to marshal evidence in support of the . . . verdict," Aplt. Brf. at 29, but makes no attempt to satisfy that requirement. He simply "submits that even with an extensive marshaling of the evidence the jury's verdict cannot be supported." Aplt. Brf. at 29. Because Defendant has wholly failed to marshal the evidence in support of his convictions, this Court should presume that the record supports the jury's verdict and affirm Defendant's convictions. *See Chavez-Espinoza*, 2008 UT App 191, at ¶¶ 7, 20. Even assuming arguendo that Defendant satisfied his marshaling burden, he has nevertheless failed to identify "a fatal flaw in the evidence." *Majestic Inv. Co.*, 818 P.2d at 1315.

The State's evidence against Defendant was strong. After Susan Weight told him not to come to her home any more, Defendant was seen watching the house across the street on several occasions. R. 308: 24, 26, 74, 91-92, 174. On August 15, within five minutes after Susan and her son left for church, the home was burglarized and Serena's car was stolen. R. 308: 28-31, 79, 94-96, 163-67, 170-73. In the ensuing week, Defendant pawned coins at four different pawn shops, from St. George, to Mesquite, and back to Salt Lake City. R. 308: 44-45, 48, 65-66, 69-71, ; R. 309: 189-91, 199, 203-05, 208-09, 242, 253, 263-67, 271-72, 278-82, 289, 294-96, 304,308-09, 312, 315-16, 324-25, 329. The majority of the coins were thereafter redeemed by

Defendant's attorney, given to her attorney, and identified by Mr. Weight. R. 308: 45-48, 65-71, 103-05; R. 309: 254-56, 282-89, 293-94, 304, 308, 312-16, 328. Defendant also made significant statements to others implicating him in the burglary and theft. He commented to his brother-in-law that Serena's car was fast, had low mileage, and may be in the desert somewhere. R. 308: 146-50. Defendant also asked him whether he was interested in two laptop computers. R. 308: 151. In letters to Susan, he said he would return the stolen property. R. 308: 50-53, 76-77. He wrote a letter of apology to Mrs. Weight, indicating that he believed his car had been taken from him, though offered that as no excuse. R. 308: 181-82. He also said that he had tried to "keep a hold of everyone's concern, some 80 percent." R. 308: 181-82. Finally, when Susan went through Defendant's belongings at the jail, she discovered her custom Zippo knife, her mother's jewelry, and other items that had been in her purse when it was stolen. R. 308: 35-39.

Defendant has identified no flaw in this evidence such that it would undermine the Court's confidence in the verdict. *State v. Briggs*, 2008 UT 52, ¶ 10. He complains that the State gave no explanation as to how he traveled in a vehicle that had broken down on the 18th of August to Mesquite, Nevada on the 19th of August, to Salt Lake City on the 23rd of August, and back to St. George on the 9th of September. Aplt. Brf. at 29-30. He also complains that the State offered no explanation as to how the vehicle was hotwired, and found in Scenic, Arizona two

weeks after he had been placed in jail. Aplt. Brf. at 29-30. With respect to the theft of the coins, Defendant complains that the stolen coins were not unique, that the victim's list of stolen coins was incomplete, and that the State did not call his attorney as a witness to testify as to the origin of the coins in his possession. Aplt. Brf. at 30-31. Defendant complains that his fingerprints were not found on the scene. Aplt. Brf. at 31. Finally, he contends that evidence showing that the internet program on the stolen laptop was used twice while he was incarcerated in a St. George jail "calls into question" his theft of the laptop. Aplt. Brf. at 31-32. These complaints do not identify a fatal flaw in the evidence. They simply reargue the weight of the evidence. This is insufficient to reverse the verdict. *See Lopez*, 2001 UT App 123, at ¶ 19.

IV.

DEFENDANT'S TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO MOVE FOR A DIRECTED VERDICT

Defendant contends that his standby counsel did not provide the effective assistance of counsel guaranteed by the Sixth Amendment. Aplt. Brf. at 32-33. But as acknowledged in his brief, Aplt. Brf. at 33, Defendant waived the right to counsel and represented himself at trial *pro se*. *See* R. 103, 105. He was only assisted by standby counsel. "Since [Defendant] waived his right to counsel, his claim of ineffective assistance of trial counsel necessarily fails. By exercising his

constitutional right to present his own defense, a defendant necessarily waives his constitutional right to be represented by counsel. Logically, a defendant cannot waive his right to counsel and then complain about the quality of his own defense." *Wilson v. Parker*, 515 F.3d 682, 696 (6th Cir. 2008).

V.

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO REOPEN ITS CASE TO PERMIT ADMISSION OF STATE EXHIBITS

Defendant next contends that the trial court abused its discretion when it reopened the case after both parties rested to allow the admission of several State exhibits. Aplt. Brf. at 44-47. Defendant argues that when the exhibits were admitted, he "was not prepared and could not (especially acting pro se) react quickly enough to counter effectively after [he] thought the case was closed." Aplt. Brf. at 44. He claims that because the case was tried before a judge, the defendant was *pro se*, and the State and Defendant both rested their cases," reopening of the case was "confusing" and "unfair" to him. Aplt. Brf. at 46. This claim also lacks merit.

Utah courts have long recognized that a trial court may within its discretion permit the State to reopen its case to introduce additional evidence. *See, e.g., State v. Gregorious*, 81 Utah 33, 16 P.2d 893 (1932) (permitting State to reopen case to call additional witness after motion by defendant for directed verdict); *State v. Lawrence*,

120 Utah 323, 234 P.2d 600 (1951) (observing that prosecutor "might properly and with little difficulty have moved to reopen and supply the missing evidence"); *State v. Seel*, 827 P.2d 954 (Utah App.) (permitting State to introduce additional testimony after orally dismissing a charge for insufficient evidence), *cert. denied*, 836 P.2d 1383 (Utah 1992). Reopening a case to address the admission of exhibits that have been discussed during trial but not admitted is best described as a housekeeping function and is well within the discretion of the trial court. *See, e.g., See People v. Walker*, 215 A.2d 418, 418 (N.Y. App. Div. 1995) (finding no abuse of discretion where trial court allowed State to reopen case for limited purpose of admitting an exhibit that had been marked for identification and offered but not received in evidence); *Carter v. State*, 230 S.E.2d 357, 358 (Ga. App. 1976) (finding no abuse of discretion where trial court permitted admission of two previously identified exhibits after both parties rested); *People v. Robbins*, 315 N.E.2d 198, 320 (Ill. App. 1974) (finding no abuse of discretion where trial court admitted exhibits after State rested without having moved for their admission during trial).

In this case, the trial court did not abuse its discretion when it reopened the case to permit the admission of the State's exhibits. After the parties rested and the court called for closing arguments, the clerk reminded the court about exhibits. R. 309: 331. With the aid of counsel, the court identified proposed exhibits upon which the court had not yet ruled. *See* R. 309: 331-33. The court identified State Exhibits

10-13, 16, and 28. R. 309: 331-33. The court admitted the exhibits, but only after first eliciting from Defendant his position on their admission.

Exhibits 10-13 were letters addressed to Susan Weight. *See* R. 308: 50-53. Susan testified that she received the letters in the mail, the letters were from Defendant, and they bore his handwriting. *See* R. 308: 50-53. Defendant objected to the letters on the ground that they were not introduced at the preliminary hearing. R. 308: 51. The court overruled the objection, but the State neglected to move for their admission. R. 308: 51. Later, when the court revisited the exhibits after the parties rested, it asked Defendant if he wished to engage in "further discussion" regarding the exhibits. R. 309: 333. Defendant complained that they were obtained by a second source and were identified only through Susan Weight's testimony. R. 309: 333. The court correctly overruled the objection, *see* Utah R. Evid. 901(b)(2), and admitted them into evidence. R. 309: 333.

Exhibit 16 was the box of coins which Mr. Weight identified as stolen from his home on August 15. *See* R. 308: 144. The box of coins, however, were in fact admitted into evidence at the close of the first day of trial. R. 308: 186. Although Defendant complained at the time that any objection to the coins would not "matter," R. 308: 186, he affirmatively stated that he had "no" objection to their admission when the court revisited the issue after the parties rested, R. 309: 332.

Exhibit 28 was the 2002 Olympic gold coin Defendant pawned to Pawn Plus in St. George and subsequently recovered by police. R. 308: 48; R. 309: 203-04, 209, 271-72, 324-25. The State moved for its admission during Deputy Quinney's testimony. R. 309: 205. Defendant objected, claiming that Mr. Weight had testified that the coin was similar, but not his. R. 309: 205. The court reserved its ruling on the motion and revisited after the parties rested. R. 309: 205, 331. The court again asked Defendant if he would like to be heard and Defendant responded that he would like to know where the coin came from. R. 309: 332. The prosecutor responded that they had received testimony on that and the court admitted the coin. R. 309: 332. A review of the record reveals that although Mr. Weight could not positively identify the coin as his because it had no serial number, he testified that it was identical to the gold coin which was part of his Olympic coin set. R. 308: 111-12.

In sum, a foundation for each of the exhibits had already been provided druing the trial. Moreover, when the trial court revisited the exhibits after the parties rested, it provided Defendant with an additional opportunity to make any further arguments against their admission and he availed himself of that opportunity. Finally, on appeal, Defendant has not argued that admission of the exhibits was otherwise improper. Under these circumstances, it cannot be said that

Defendant was unfairly prejudiced by the court's reopening of the case or that the trial court otherwise abused its discretion. [6]

VI.

THE CUMULATIVE EFFECT OF ANY ALLEGED ERRORS DOES NOT REQUIRE REVERSAL

In his final claim on appeal, defendant contends that this Court should reverse his conviction and remand for a new trial because the cumulative effect of the trial court errors prejudiced his right to a fair trial. Aplt. Brf. at 47. However, where, as here, the defendant "has failed to establish any errors ... that prejudiced his right to a fair trial, the doctrine of cumulative error does not apply." *Parsons v. Barnes*, 871 P.2d 516, 530 (Utah), *cert. denied*, 513 U.S. 966, 115 S.Ct. 431 (1994); *accord State v. Gonzales*, 2005 UT 72, ¶ 74, 125 P.3d 878 (holding that "if the claims are found on appeal to not constitute error, or the errors are found to be so minor as to result in no harm, the doctrine will not be applied").

CONCLUSION

For the foregoing reasons, the Court should affirm.

---

[6] Defendant's reliance on *State v. Brickey*, 714 P.2d 644 (Utah 1986), is also misplaced. None of the concerns of *Brickey*, e.g., overreaching, harassment, or forum shopping, are implicated in a reopening of the case.

Respectfully submitted August 6th, 2008.

MARK L. SHURTLEFF
Utah Attorney General

JEFFREY S. GRAY
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on August 6th, 2008, two copies of the foregoing brief were

☐ mailed ☐ hand-delivered to:

Randall W. Richards
Public Defender Ass'n of Weber County
2550 Washington Blvd., Ste. 300
Ogden, UT 84401

A digital copy of the brief was also included: ☐ Yes ☒ No